IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,678

RICHARD GREVE,

Petitioner,

v.

CIVIL AERONAUTICS BOARD and WILLIAM F. McKEE,
Administrator of the Federal Aviation Agency,

Respondents.

PETITION TO REVIEW AN ORDER OF THE
CIVIL AERONAUTICS BOARD

DONALD F. TURNER,
Assistant Attorney General,

HOWARD E. SHAPIRO,
Attorney,
Department of Justice,
Washington, D.C. 20530

JOSEPH B. GOLDMAN
General Counsel,
Civil Aeronautics Board,
Washington, D.C. 20428

O. D. OZMENT,
Deputy General Counsel,

WARREN L. SHARFMAN,
Associate General Counsel,
Litigation and Legislation,

FREDERIC D. HOUGHTELING,
PAUL D. GERBER,
Attorneys,
Civil Aeronautics Board.

INDEX

CITATIONS

Cases:

Index Continued

Index Continued

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,678

RICHARD GREVE,

Petitioner,

v.

CIVIL AERONAUTICS BOARD and WILLIAM F. McKEE,
Administrator of the Federal Aviation Agency,

Respondents.

BRIEF FOR THE RESPONDENT

JURISDICTIONAL STATEMENT

The jurisdiction of the Civil Aeronautics Board to issue the order here challenged rested on section 609 of the Federal Aviation Act of 1958 (infra, p. 32). The jurisdiction of this Court is invoked under section 1006 of the Federal Aviation Act (infra, p. 34) which provides for the filing of a petition for review within 60 days after entry of the Board's order. The Board's order was adopted on November 26, and served on November 29, 1965; the petition for review was filed on January 28, 1966.

COUNTERSTATEMENT OF THE CASE

Petitioner seeks review of Civil Aeronautics Board Order S-1324, November 26, 1965 (Tr. 137-151), which affirmed an emergency order of the Administrator of the Federal Aviation Agency (Tr. 8-9) revoking

his second class airman medical certificate. The revocation was based upon petitioner's medical disqualification under the Federal Aviation Regulations, sections 67.15(f)(2)(i) and 67.17(f)(2)(i) (infra, p. 35), in that petitioner had recurrent episodes of paroxysmal arrhythmia (auricular fibrillation), a disorder of the heart, which in the Administrator's judgment rendered him unable safely to exercise the privileges of his airman's certificate.

The Administrator of the Federal Aviation Agency is charged by the Federal Aviation Act of 1958 (49 U.S.C. 1301, et seq.) with prescribing and administering standards and regulations governing the safety of flight. Pursuant to this charge, the Administrator prescribes the standards to be met by applicants for airmen certificates, including standards of physical fitness, and issues such certificates (sections 313(a), 601(a)(6), and 602, infra, pp.31-32). In order to fly, an airman must have both a pilot and a medical certificate of the appropriate class (Federal Aviation Regulations, section 61.3(c), 14 C.F.R. 61.3(c)); 1/ the medical certificate is regarded as a separate "airman certificate" within the statutory sense.

Section 609 of the Act (infra, p. 32) permits the Administrator to revoke or suspend an airman certificate if, after investigation, "he

---

1/ The Administrator has provided for three classes of medical certificates: a Class 1 certificate required of airmen with airline transport pilot certificates (14 C.F.R. 61.141(e)); a Class 2 certificate required of airmen with commercial pilot certificates (14 C.F.R. 61.111(c)); a Class 3 certificate required of airmen with private pilot or student pilot certificates (14 C.F.R. 61.81(c), 61.61(a)(3)).

determines that safety in air commerce or air transportation and the public interest requires" such action. Section 609 further provides that the airman may appeal such action by the Administrator to the Board for de novo consideration. The Administrator is required to establish before the Board that the certificate should be revoked or suspended, and the Board may modify or reverse the Administrator's order if it finds that air safety and the public interest "do not require affirmation." The Board's rules specify that "in proceedings under section 609 of the Act, the burden of proof shall be on the Administrator" (section 301.22, infra, p. 38).

On August 20, 1964, petitioner was issued a second class medical certificate by a designated FAA medical examiner (Tr. 8) 2/ pursuant to section 67.15 of the Federal Aviation Regulations (infra, p. 35). This section lists standards which must be met by the airman to qualify for a second class medical certificate. The list includes standards of visual and aural acuity and sets forth certain medical conditions which

---

2/ Medical certificates are issued throughout the country by physicians who have been designated FAA medical examiners by the Administrator. If the airman is deemed by him qualified, the medical certificate is issued by the physician, under delegated authority, immediately following his examination of the airman. These certificates are then subject to review and reconsideration by the Administrator (F.A.R., section 67.25(b), 14 C.F.R. 67.25(b); section 314(b) of the Act, 49 U.S.C. 1355(b)). The Administrator may then, as he did in this case, notify the airman that he does not meet the medical standards and revoke the certificate originally issued by the examiner.

Petitioner asserts that he had fully disclosed his condition to the medical examiner when he applied for the medical certificate (Pet. Br. 4). The record does not, however, show this. In any event, the action of the field examiner is subject to the review noted above by the Administrator's medical experts.

are disqualifying: e.g. disturbance in equilibrium, psychotic disorder, chronic alcoholism, drug addiction, epilepsy, history or clinical diagnosis of myocardial infarction or angina pectoris. The regulation concludes with a section which covers general medical conditions, as follows:

> "(f) General medical condition:
>
> * * * * *
>
> (2) No other organic, functional, or structural disease, defect, or limitation that the Civil Air Surgeon finds --
>
> (i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying;
>
> * * * * *
>
> and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved."

On March 18, 1965, the Administrator issued an emergency order,[3/] revoking that medical certificate on the ground that petitioner had suffered recurrent episodes of paroxysmal arrhythmia (auricular fibrillation), a disorder of the heart, which made him unable to safely perform the duties or exercise the privileges of his airman certificate consistent with safety in air commerce (Tr. 8), and therefore disqualified him under

---

3/ Sections 609 and 1005(a) (infra, pp. 32-33) provide for emergency procedures under which the suspension or revocation takes effect immediately upon issuance of the order when the Administrator determines that safety in air commerce requires such action. In such emergency proceedings, the Administrator's order is not stayed upon appeal to the Board, but remains in effect until the Board orders otherwise. In the instant proceeding the parties waived certain of the procedures, including time limitations, normally applicable to review of an emergency order (Tr. 88-91).

sections 67.15(f)(2)(i) and 67.17(f)(2)(i) of the Federal Aviation Regulations.

Petitioner appealed this revocation to the Board, and an evidentiary hearing was held before a Board examiner on March 30, 1965 (Tr. 16) and July 15, 1965 (Tr. 83). At the opening of the hearing, petitioner stipulated that he had suffered recurrent episodes of paroxysmal arrhythmia (auricular fibrillation) (Tr. 21). The only issue remaining for determination, therefore, was whether this condition disqualified petitioner under the regulations from holding his medical certificate.

In support of his contention that petitioner's condition was disqualifying, the Administrator offered the testimony of Dr. Edwin E. Westura, an expert cardiologist and a medical officer of the Office of Aviation Medicine of the FAA. Dr. Westura described paroxysmal arrhythmia (auricular fibrillation) as a condition which causes a "grossly irregular or chaotic beating of the heart" (Tr. 25). The particular form of fibrillation with which the petitioner is afflicted occurs in unexpected episodes or attacks. An attack is initiated at an irritable focus in the heart which directs nerve impulses at the rate of 300 to 400 per minute at the upper chambers of the heart (known as the atria or auricles). The impulses continue through the atria to barrage the lower chambers of the heart (known as the ventricles). At this point the body's defensive system normally reduces the impact of these impulses so as to create a heart beat of only 150 to 180 beats per minute, as opposed to the 300 to 400 impulses with which it is barraged. This heart beat is, however, still significantly greater than the normal heart beat of 60 to 100 per

minute. (Tr. 25-29). Describing the reaction of the heart to such an attack Dr. Westura stated: "if you can look at the heart, it looks like a bag of worms contracting. There is no regularity to it, no rhythm or rhyme or reason to it at all" (Tr. 27).

Dr. Westura then described the functional changes in the body which result from attacks of this sort:

> "There are four major functional changes which take place as a result of this. The main functional change is a decrease in the amount of blood which the heart can pump per minute. This is called a decrease in the cardiac output.
>
> "The second change is a result of the decrease in the cardiac output or in the amount of blood which the heart pumps per minute and this is the result of the decrease in other areas of the body so that this fall in the amount of blood flow occurs in the heart, in the kidneys, in the brain, in the central nervous system and this produces secondary effects.
>
> "A third major effect, if not controlled or treated, this condition can result in failure of the heart.
>
> "The fourth and final complication is rare; because there is this irregular chaotic beating of the atria, blood can coagulate or clot within the atria and these clots can be carried to other portions of the body as emboli and these could produce similar secondary effects." (Tr. 29)

Based upon his experience with paroxysmal arrhythmia (auricular fibrillation), which included seeing two to three patients per week at Georgetown University Hospital with this condition (Tr. 49), and the descriptions of petitioner's particular condition set forth in statements submitted by petitioner to the Administrator (Administrator's Exhibits 1

and 2,[4] Tr. 75-77), Dr. Westura described how petitioner would be unable to safely perform the duties of an airman within the meaning of the regulations. First, the normal decrease of oxygen during flight conditions would increase the possibility of an attack of paroxysmal arrhythmia and, of course, would aggravate the functional changes occasioned by the decrease in oxygen supplied to the body as a result of the attack (Tr. 35-36). Second, the attacks suffered while piloting a plane could precipitate several uncontrollable, subconscious reactions such as fear, anxiety, anger, hyperventilation, and other compensatory responses which might further aggravate the overall results of the disorder of the heart beat itself (Tr. 37). Third, change in blood flow brought about by an attack could result in serious inability to make judgments and decisions required in the proper exercise of aircraft control (Tr. 37). Finally, the sensation of heart palpitation experienced during an attack could be severely distracting while piloting an aircraft (Tr. 38).

In sum, it was Dr. Westura's opinion that an attack of the sort which petitioner was subject to could create conditions that "would be very dangerous in flying an airplane in terms of safety" (Tr. 40-41).

Petitioner called as his only witness Dr. William A. Kornblum.[5]

4/ Exhibit 1 is a written statement of the Head of Cardiology, San Diego Naval Hospital, Dr. W. S. Myers, setting forth a medical history of petitioner's heart condition (Tr. 75). Exhibit 2 is an undated written statement by the petitioner further outlining his condition (Tr. 77).

5/ Dr. Kornblum was one of a large number of medical examiners designated by the FAA throughout the country to make an initial determination of the airman's qualifications. Such a determination is routinely subject to review by the Civil Air Surgeon under procedures indicated, supra, p. 3, note 2.

Dr. Kornblum's only testimony was that he had examined petitioner on August 20, 1961, found him fit for flying private aircraft, and issued the medical certificate here in question (Tr. 57). The witness was asked no questions and volunteered no information regarding petitioner's heart condition (Tr. 56-57).

At this juncture, after the Administrator had presented his case and petitioner had failed to offer any evidence concerning the effect of his disability, the examiner suggested to him that he needed the testimony of a qualified medical witness to support his contention that, in spite of such condition, he was not unqualified to hold a medical certificate. (Tr. 62). Petitioner thereupon attempted to offer into evidence a letter dated March 29, 1965, from Dr. David B. Carmichael, a heart specialist. Dr. Carmichael, however, was not present and the examiner sustained the Administrator's objection to the admission of the letter on the ground that it was hearsay (Tr. 62, 72). The examiner called a short recess so that petitioner might attempt to arrange for Dr. Carmichael's testimony. When this proved unsuccessful the examiner suggested, and all parties agreed, that the hearing be continued until such time as petitioner was able to obtain qualified medical testimony (Tr. 70).

The hearing was reconvened three and one-half months later. At this hearing petitioner was represented by counsel. He declined to offer further testimony and asked only that the letter of Dr. Carmichael which had previously been denied admission be attached to the record for

possible appeal purposes.[6] His counsel then stated "we will offer no further evidence" (Tr. 88).

On August 4, 1965, the examiner issued his initial decision in which he found "that by reason of [petitioner's] recurrent episodes of paroxysmal arrhythmia the Civil Air Surgeon may reasonably find that [petitioner] is unable to safely perform the duties or exercise the privileges of an airman" (Tr. 98). The examiner, therefore, ordered that the Administrator's emergency order of revocation be affirmed.

Petitioner appealed to the Board on three grounds: first, that the Administrator had failed to sustain his burden of proof; second, that an unbiased hearing officer has not been provided; and, finally, that the regulation under which petitioner was disqualified did not provide enforceable standards (Tr. 108).

The Board reviewed the record in its opinion, included detailed findings on the testimony of Dr. Westura and Dr. Kornblum and petitioner's medical history, and concluded that "it is clear from the above that the preponderance of the evidence supports the finding under sections 67.15(f)(2)(i) and 67.17(f)(2)(i) of the F.A.R. that respondent has a disease which makes him unable to safely perform the duties or exercise the privileges of the airman certificate that he holds and we conclude that the Administrator has met the burden of proof" (Tr. 41-42). The Board further found that "the contention that the examiner prejudged the

---

6/ Petitioner has not, however, alleged error concerning this letter in his appeal to either the Board or this Court.

case is completely without merit" (Tr. 143). As to petitioner's challenge to the Administrator's regulation, the Board stated that it was without power to pass on the validity of such regulations (Tr. 143).

STATUTES AND REGULATIONS INVOLVED

The provisions of the Federal Aviation Act, the Federal Aviation Regulations, and the Board's procedural regulations principally involved are set forth in Appendix A, infra, p. 31 .

SUMMARY OF ARGUMENT

I

The Board properly found petitioner unqualified under the regulations to hold a medical certificate, a finding clearly supported by substantial evidence. The basic facts are not in dispute, since petitioner admits that he has had recurrent attacks of paroxysmal arrhythmia (auricular fibrillation). The only evidence in the record as to the probable future course of petitioner's heart condition and the hazards to air safety involved is that of the Administrator's expert medical witness, who testified, on the basis of his own experience and petitioner's medical record, that an attack while petitioner was flying a plane was entirely possible and that the consequences of such an attack would be "very dangerous . . . in terms of safety" (Tr. 40-41). Petitioner's statement to the Administrator and the medical expert's detailed coverage of the consequences and possibilities of further attacks upon petitioner form an adequate basis for the Board's determination that petitioner suffers from a condition which makes him "unable to safely perform the duties or exercis the privileges of the airman certificate that he holds."

II

Petitioner's attack on the validity of the Administrator's regulation cannot be sustained. First, the question of validity need not be reached by the court -- it is doubtful whether the court has jurisdiction to consider the question, and in any event the petitioner's attack so lacks substance that it may be dismissed as specious. Second, if the court does undertake to consider the validity of the regulation, it is plainly reasonable, provides adequate standards, and is within the scope of the Administrator's statutory authority.

III

Petitioner's charges of bias on the part of the hearing examiner are wholly without merit. The evidence relied upon by petitioner to support his charges shows only that the examiner was attempting to assist petitioner when he was not represented by counsel. Moreover, so far as the examiner's comments evidence any view on the merits they are still quite proper, since they were offered at the conclusion of the hearing when both parties had indicated that they had no further evidence -- at a time, in other words, when the Board's Procedural Regulations called for the examiner to express his final determination on the merits in the form of an oral initial decision.

ARGUMENT

Introduction

The issue in this case is whether petitioner's admitted heart disorder disqualifies him from holding an airman medical certificate. In a routine review, the Administrator and his medical experts determined, upon information submitted by petitioner, that the condition was

disqualifying. When petitioner appealed to the Board, the Administrator offered the testimony of an expert cardiologist who described the dangers to air safety of petitioner's condition. Petitioner offered no evidence in rebuttal although he was afforded a postponement of three and one-half months to do so. Instead, after employing counsel, he has avoided showing his own qualifications but has limited himself to legal attacks on the regulations, the medical expert, and the hearing examiner, who tried to protect petitioner before he had counsel. For this reason, the court will quickly observe that the Board's findings are supported by substantial evidence and must be sustained. Section 1006(e) of the Act (infra, p.34); John Doe v. Civil Aeronautics Board, 356 F.2d 699 (C.A. 10, 1966); Nadiak v. Civil Aeronautics Board, 305 F.2d 588, 592 (C.A. 5, 1962), cert. denied, 372 U.S. 913 (1963). It will likewise quickly appear that the make-weight "legal" arguments, which create a diversion from petitioner's lack of medical qualification, are specious.

I. The Board's determination that petitioner's recurrent episodes of paroxysmal arrhythmia (auricular fibrillation) disqualify him for a medical certificate under the Administrator's standards is supported by the record.

Petitioner argues that the Board erred in finding that the Administrator had sustained his burden of proof. He states first that the evidence offered by the Administrator was not sufficient to establish his case and, second, that petitioner's statements, contained in the Administrator's exhibits, that he was able to control his attacks served to adequately refute any showing of disqualification made by the Administrator. Indeed, he suggests that he was required to establish that

he was medically qualified, rather than the Administrator being required to establish that he was unqualified. An examination of the evidence shows clearly, however, that the burden was not placed upon petitioner and that the Administrator overwhelmingly sustained his burden of proof.

The record is clear that petitioner has a long history of heart ailment. In two statements he submitted to the Administrator, petitioner describes numerous attacks commencing in 1958, some lasting as long as one hour and causing lightheadedness and an uncomfortable feeling (Tr. 75, 77). Recognizing the seriousness of the attacks petitioner gave up flying, began taking digitalis, adopted a sedentary life and began dieting. At the opening of the hearing, petitioner stipulated to the fact that he had had recurrent episodes of paroxysmal arrhythmia (Tr. 21); this fact was therefore not at issue. The Administrator then proceeded to offer the testimony of Dr. Edwin E. Westura, an expert cardiologist. 7/ He described the disorder known as paroxysmal arrhythmia

---

7/ Petitioner's attack (Pet. Br. 4) on Dr. Westura's qualifications as an expert is based upon a misleading statement concerning Dr. Westura's certification by the American College of Physicians to the Board of Internal Medicine. Albeit Dr. Westura had not been certified at the time of the hearing, he clearly stated, in response to petitioner's query, that he was Board-eligible and had completed Part One of his examination and was scheduled to take Part Two shortly after the hearing (Tr. 41).

Among the credentials offered by Dr. Westura to establish himself as an expert in cardiology were the following: served in the Air Force as an internist and cardiologist; National Institute of Health, fellow in cardiology; Chief of the Cardiovascular Laboratory at the Georgetown Clinical Research Unit of the FAA; Executive Officer of the Department of Medicine and a member of the Division of Cardiology of the Georgetown University Hospital; and, at the time of the hearing, engaged in research

(footnote continued)

(auricular fibrillation) and detailed the effects of an attack both generally and specifically as to petitioner.

Dr. Westura first described, in layman's terms, what occurs during an attack of paroxysmal arrhythmia: the increased barrage of impulses to the heart, the heart's defensive reaction, and the resultant increased and arrhythmical heartbeat (Tr. 26-28). 8/ He then went on to describe the four major functional changes that occur in the body when one is subject to an attack of this "grossly irregular or chaotic beating of the heart" (Tr. 25): first, a decrease in cardiac output, i.e., the amount of blood which the heart can pump; second, the resultant decrease in the amount of blood flow to the vital areas of the body, such as the brain, the central nervous system, and the kidneys; third, if

---

in cardiovascular disease as it pertains to the problems of civil aviation (Tr. 23-24).

In view of Dr. Westura's qualifications and the fact that petitioner offered no contrary medical testimony, his attack on Dr. Westura's qualifications because he was not yet certified to the Board of Internal Medicine is completely without merit. See King v. United States, C.A.D.C. No. 19,641 (decided December 21, 1966), slip opinion, p. 25, wherein the court stated:

> "Assuming that the prosecutor acted properly in eliciting testimony defining the witnesses' qualifications, we see no warrant in this case for his stressing to the jury, through summation, that the testifying psychiatrists were not diplomates where there was no contrary psychiatric testimony. The argument carried the implication that a more experienced expert might or would have reached a different conclusion. If there was any basis for such an implication it should have been adduced in the form of testimony presented by the Government, which had the burden of proof."

8/ A more detailed description of the attack is set forth in the Counterstatement, supra, pp. 5-6 .

the attack is not controlled "this condition can result in failure of the heart"; finally, on rare occasions, the piling up of the blood in the heart can result in the release of emboli (blood clots) into the blood stream (Tr. 29-30).

Following this general discussion, Dr. Westura turned specifically to petitioner's medical history and the probable effect an attack would have upon petitioner. The Administrator introduced into evidence (Tr. 31-32) certified copies of documents submitted to the FAA by the petitioner concerning his history of attacks. Exhibit 2 (Tr. 77) is a statement by petitioner, submitted subsequent to his application for the medical certificate, which described his attacks. Dr. Westura particularly noted petitioner's statements that the condition was first discovered in 1958 at a physical examination, that petitioner had suffered two attacks which had lasted about one hour each and made him feel uncomfortable and lightheaded, and subsequent episodes of a few seconds duration (Tr. 32-33). Exhibit 1 (Tr. 75) is a statement submitted by the Head of Cardiology of the San Diego Naval Hospital concerning his observations of petitioner over a twenty-three month period prior to December, 1964. Dr. Westura found of significance in this report the statements that petitioner had admitted to recurrent attacks and had stated that he was able to control these attacks by physical relaxation and a modified Valsalva maneuver 2/ (Tr. 33). He also noted that an attack

---

2/ Dr. Westura described the Valsalva maneuver as a "forced expiration against the closed glottis" (Tr. 38).

had been recorded on a electrocardiogram taken at the clinic.[10]

Based upon these statements submitted by petitioner, Dr. Westura concluded that petitioner "does have a serious medical condition" (Tr. 34). He then went on to relate petitioner's condition to his ability to safely perform the duties of an airman within the meaning of the regulation. First, he noted that the normal decrease of oxygen during flight conditions would increase the possibility of an attack (Tr. 35-36). Second, an attack occuring during operation of a plane could precipitate several uncontrollable subconscious reactions, such as fear, anxiety, anger, hyperventilation, and other compensatory responses which might further aggravate the condition (Tr. 37). Third, "changes in the blood flow could result in serious inability to make judgments and to make decisions, required for the proper exercise of aircraft control" (Tr. 37).[11] Finally, the sensation which the petitioner stated he felt during an attack, i.e., irregular palpitations, could be a very distracting experience while piloting an aircraft (Tr. 38). Dr. Westura concluded that loss of control of the aircraft could be the result of an attack (Tr. 38), and that the consequences of an attack "would be very dangerous" in flight (Tr. 40-41).

10/ Evidence of an attack can be recorded on an electrocardiogram (EKG) only if the attack occurs during the taking of the EKG. An EKG taken at any time subsequent to the attack will not show the irregularities which occurred during the attack.

11/ This is particularly significant in view of petitioner's admission that he suffered one hour periods of "lightheadedness" during attacks (Tr. 77).

In answer to this rather overwhelming evidence that petitioner was not qualified under the regulations, the petitioner offered nothing. He offered no expert testimony that the consequences of an attack would be other than as stated by Dr. Westura, or that he, for some reason, would not suffer these particular consequences. The only medical testimony he offered was a statement by an FAA medical examiner (not a cardiac specialist) that on the date he issued petitioner his medical certificate he considered petitioner fit for flying private aircraft (Tr. 57).[12/] Nor did he himself testify concerning his experience with these attacks. To overcome the Administrator's evidence petitioner relies on a statement in Dr. Myer's letter (Administrator's Exhibit 1, Tr. 75) to the effect that he (petitioner) had stated to Dr. Myers that he was able to control the attacks by physical relaxation and a modified Valsalva maneuver.[13/]

12/ The second class medical certificate which the Administrator revoked together with the appropriate airman certificate would allow petitioner to operate commercial aircraft (F.A.R., section 61.111(c)). Although petitioner did not at the time hold a commercial pilot certificate, there would be no medical basis for withholding the certificate if petitioner's contentions as to his medical qualifications were upheld. With a commercial certificate an airman may act as a pilot in command of an aircraft carrying passengers or property for hire (F.A.R., section 61.131(a)).

13/ Petitioner also places some emphasis upon a statement made by him in his letter to the FAA (Administrator's Exhibit 2, Tr. 77) that a Naval medical board had declared him fit for the actual control of aircraft in "Service Group 1 (highest)" (Pet. Br. 5). No evidence was offered concerning the examination or requirements for this "Service Group 1"; nor would such evidence be of any significance. A seven-year old physical could hardly be considered refutation of a determination by the Administrator that petitioner could not currently meet the medical standards of the Federal Aviation Regulations. In any event, a definite change in petitioner's medical condition was evidenced by three hour-long attacks subsequent to the Navy medical board determination (Tr. 77).

This could hardly be considered an answer to the Administrator's evidence even if petitioner had offered some substantive evidence to support his argument. Dr. Westura testified that one of the consequences of an attack would be a "serious inability to make judgments and to make decisions required for the proper exercise of aircraft control" (Tr. 37). Even if petitioner does have the physical ability to ultimately control an attack, short of actual heart failure, this does not serve to mitigate the dangers inherent in a loss of the ability to make judgments and decisions while at the controls of a plane. When an airman is operating a plane at a busy airport where he must be on the alert for other aircraft, accept directions from the airport control tower, maintain a watch on his plane's instruments, maintain control of the plane, and accept weather reports, safety in the air demands that the airman not be subject to lapses in his ability to make judgments. Moreover, even if the airman were able to control his judgment during such an attack by a sudden complete relaxation and the execution of a modified Valsalva maneuver, [14] safety in the air would be subject to the same dangers by this lapse in physical capability as it would from a lapse in ability to make judgments. Petitioner, himself, recognized the seriousness of these

---

14/ The only evidence in the record concerning the effect of a Valsalva maneuver is that offered by Dr. Westura. He stated:

> "First of all, I have never found these simple measures in my experience to be effective in controlling arrythmia fibrillation, and secondly, I think the amount of valsalva that might be necessary to prevent or abort an attack if one did occur could produce further decreases in blood flow, because the natural response of the valsalva is to decrease the amount of blood that returns to the right side of the heart." (Tr. 40).

attacks when, as he stated in his letter, he "voluntarily gave up flying in my 20th year of flying" (Tr. 77).

Petitioner also asserts that the Administrator's evidence is inadequate because it "certainly does not prove that flying will have anything to do with Mr. Greve's problem, or will precipitate it" (Pet. Br. 7). First, the uncontradicted testimony of Dr. Westura indicates that the attacks are more likely to occur and are likely to be more severe in the air than on the ground (Tr. 35-36). Second, whether these seizures are more likely to occur in flight than on the ground, is not a controlling factor. The Administrator's determination that petitioner was unable to safely perform the duties or exercise the privileges of his airman certificate was based upon a consideration of the potential consequences of an attack together with the possibility of an attack while petitioner is piloting a plane. Petitioner's history of attacks -- three of one hour's duration and numerous shorter attacks -- presents adequate proof of the possibility of future attacks and the creation of a hazard to safety in the air.

No finding was made in terms of percentage or probability of petitioner having an attack while piloting an aircraft; nor was such a finding required. Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892, 898 (C.A. 2, 1960). Rather, the expert Administrator must exercise his discretion in light of the facts before him and make a determination in the interest of safety whether petitioner's presence in the air would create a significant risk.

All of the evidence points to the dangers inherent in allowing an airman with paroxysmal arrhythmia, specificially petitioner, to pilot an aircraft. The regulations clearly provide for disqualification for one with petitioner's history which "may reasonably be expected to result in a condition which would in fact be disabling for safe flying." (24 F.R. 7309, 7311 (1959)).

II. Petitioner's attack upon the validity of the Administrator's regulatory standard is without merit, and may be beyond the jurisdiction of this Court.

In its order the Board noted that its power of review under the Act does not extend to a determination of the validity or wisdom of the regulations of the Administrator (Tr. 143). (This position was noted with apparent approval in John Doe v. Civil Aeronautics Board, 356 F.2d 699, 700.) The basis for this position is discussed in Appendix B, infra, pp. 39 - 48 . It also has been the Board's position before the courts that review of the validity of the Administrator's regulations is not available in an appeal from a Board order under section 1006(a) (infra, p. 34), but may only be reviewed in a suit in the district court directly challenging the regulation. See e.g., Air Line Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892 (C.A. 2, 1960). 15/

15/ We have appended to this brief an excerpt from the Board brief in John Doe v. Civil Aeronautics Board, 356 F.2d 699 (C.A. 10, 1966), setting forth the Board position as to the jurisdiction of this Court to consider the validity of the Administrator's regulations in a section 1006 appeal such as this. Appendix B, infra, pp. 39-48. As in John Doe (infra, p. 48) , the Department of Justice reserves its position on this issue.

This latter question has been twice considered by the courts, in John Doe v. Civil Aeronautics Board, 356 F.2d 699 (C.A. 10, 1966) and Carrington v. Civil Aeronautics Board, 337 F.2d 913 (C.A. 4, 1964), cert. denied, 381 U.S. 927 (1965). In both cases the Board urged that such review was not available, but that, in any event, the regulations were so patently valid that the jurisdictional question need not be reached. In Carrington, the court found, as the Board urged alternatively, that the challenge to the regulation was "so lacking in substance" as not to require it to reach the jurisdictional question. In contrast, in John Doe the court considered that the question of validity could be considered by the Court (as distinguished from being considered by the Board), as an incident to review of a Board order applying the regulation.

Our position remains the same as in the Carrington and John Doe cases (see Appendix B, infra, pp. 39-48). In this case, as in Carrington, we submit that the attack on the Administrator's regulation is so lacking in substance as to justify dismissal without consideration of the jurisdictional issue.[16/] If, however, this Court should consider that a substantial question of validity is presented and should assume jurisdiction to review, we submit that it must also, as did the court in John Doe, sustain the Administrator's regulation as valid.

16/ The Court said that petitioner's "contention that [the regulations] are unconstitutionally vague and otherwise invalid are so lacking in substance, however, that we need not consider whether or not such questions are properly before us." (337 F.2d at 917).

That the instant regulation was properly promulgated by the Administrator pursuant to his statutory authority is not questioned. Airline Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892 (C.A. 2, 1960). Petitioner's attack is directed solely to the question of whether the regulation provides a sufficiently definite or certain standard for action. It is important, first, to note that this is not a regulation designed for the guidance of airmen, but rather for the guidance of medical experts in determining whether the airman is suffering from a disorder that makes him "unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying."

Secondly, the overall regulations are not, as petitioner would have it, carte blanche authority to physicians to disqualify an airman pursuant to their whim. The medical regulations, including the instant one, were adopted following an extensive study of desirable medical standards under a special appropriation by Congress. Out of that study, conducted by the Flight Safety Foundation, Inc., came a number of recommendations to add certain specified conditions to the list of those which are disqualifying. 24 F.R. 2257 (1959). All conditions are not as susceptible of definition, listing or precise measurement, however, as are visual acuity, history of myocardial infarction, epilepsy, or drug addiction. A general medical condition regulation was, therefore,

included.[17] It provided as definitive a standard for its application as is possible under the circumstances: the inability of the airman to safely perform his functions.[18] It also provided the specific basis upon which such a finding is to be grounded: "the case history and appropriate, qualified medical judgment relating to the condition

---

17/ "(f) General medical condition:

* * * * *

(2) No other organic, functional, or structural disease, defect, or limitation that the Civil Air Surgeon finds --

(i) Makes the applicant unable to safety perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying;

* * * * *

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved."

18/ The Administrator stated in the preamble to these regulations:

"The standard of ability to perform the duties or to exercise the privileges of an airman certificate has been retained as a necessary measure of the significance of the disability. To eliminate the possibility of considering minor deficiencies as disabling under this standard, the standard is now limited to such deficiencies which are or may reasonably be expected to result in a condition which would in fact be disabling for safe flying. The Civil Air Surgeon is charged with the duty of finding whether such a condition exists or may result, but his findings may be made only on the basis of professionally qualified medical judgment and only in relation to the individual's condition involved." 24 F.R. 7309, 7311 (1959).

The standard of "disability" to perform a function is one used in a variety of situations in the law. See, e.g., Longshoreman's & Harbor Worker's Compensation Act, 33 U.S.C. 902(10).

involved."[19] As was held in John Doe, which rejected a similar contenti of vagueness, the question of whether the condition from which the airman suffers is severe enough to be disqualifying "lies in the realm of competent proof."[20]

In sum, the instant regulation does not provide the Administrator with a tool for arbitrary action, as petitioner asserts. If a medical certificate is denied or revoked under the regulation the airman may appeal to the Board where the Administrator must support his action by convincing evidence adduced at a full and fair hearing; and even then the determination of the Board is subject to review by the courts. Thus, not only are the standards of the regulation sufficiently clear, but there are numerous safeguards in their application to individual airmen. The regulation thus is clearly within the scope of the Administrator's power to fix physical standards for issuance of airman's certificates, is directly related to safety in air commerce, is legally sufficient in terms of standards, and is surrounded by the additional safeguards of Board and court review. Plainly, therefore, the regulation is valid.

19/ Petitioner argues that, under this regulation, a headache could be disqualifying. Indeed, if the Administrator's medical expert determined, based upon a particular case history and the expert's appropriate, qualified medical judgment, that an individual airman was unable to safely perform the functions of his airman certificate because of persistent headaches, such a condition would be disqualifying.

20/ As previously noted, an earlier attack on the same regulation and on the same grounds was dismissed as totally lacking in substance. Carrington v. Civil Aeronautics Board, 337 F.2d 913 (C.A. 4, 1964), cert. denied, 381 U.S. 977 (1965).

III. There is no evidence that the hearing examiner was biased or prejudged the case.

Petitioner's allegations that the hearing examiner prejudged the case is wholly lacking in substance. His attack is based solely on a number of statements made by the examiner at the conclusion of the hearing (when petitioner was not represented by counsel) indicating the examiner's view that petitioner needed a medical witness to "complete his case." First, even if these comments were construed as an indication by the examiner of his judgment, they do not show prejudgment or bias; and, second, if the comments show anything they show a disposition favorable to petitioner rather than against him.

The comments were made at the end of the hearing, after both the Administrator and petitioner had indicated that they had no further evidence to offer. Under the Board's Procedural Regulations, it is proper for the examiner at this point to set forth his determination on the merits in the form of an oral initial decision.[21/] As the Board observed:

> "The record is clear that the examiner expressed no judgment on the merits of the case until after the evidence was in. Indeed, the examiner instead of suggesting and allowing a continuance for the benefit of the[petitioner] properly could have, pursuant to section 301.50(c) of the Rules of Practice, issued an oral initial decision at that time on the record then before him. The contention that the examiner prejudged the case is completely without merit" (Tr. 143).

21/ Procedural regulations, section 301.50(c) (infra , p. 38). It was not until later that this procedure was waived by both parties (Tr. 88-91).

Because the examiner did not render his decision at this time, but instead attempted to aid petitioner, indicated his willingness to go to great lengths to facilitate the petitioner in the presentation of his case, and even postponed the hearing for three and one-half months to allow him to obtain further testimony, petitioner now charges that the hearing examiner was biased and prejudged the case.

In addition to the lack of any evidence of "prejudgment", an examination of the comments themselves clearly shows a lack of any bias against petitioner. Petitioner reads into the comments an indication by the examiner that he had improperly shifted the burden of proof from the Administrator to petitioner. A reading, even of the excerpts presented by petitioner, belies this contention. The Administrator had offered extensive testimony to establish the allegations in his complaint and the examiner advised petitioner, who was not at that time represented by counsel, that it would be in his interest to present some evidence or testimony in defense. At most, the examiner was merely telling petitioner that the Administrator had sustained his burden of going forward with the evidence and that,without further evidence from petitioner, he would immediately issue his oral initial decision finding against petitioner. 22/

22/ This is somewhat analogous to a situation where a defendant moves to dismiss at the conclusion of the plaintiff's case on the ground that plaintiff has failed to sustain his burden of proof. At this point, the trial judge must express his judgment on whether the plaintiff has sustained his burden or not. If he denies the motion,he is in a sense stating to the defendant that he must offer some evidence to "support his case" -- i.e., present a case in defense.

The conclusion of the interchange which petitioner claims proves his charge of bias can perhaps best serve to put that charge to rest:

"Hearing Examiner: Let me now see if I can summarize the substance of our conversation. It has been recognized that Mr. Greve requires the testimony of a qualified medical witness and such a witness is not available at this time, and as Examiner in this case, I have suggested to Mr. Greve that he request the case to be continued until he is able to produce a qualified medical witness.

* * * * *

"Accordingly, it has been proposed to Mr. Greve that this case be continued indefinitely and the case will be set for further hearing when Mr. Greve has advised me as the Examiner that he does have a qualified medical witness available to testify and when the case can be heard along with another medical case in this general Southern California area which would necessitate Mr. Schmerer or someone else from his office coming from Washington out here for that purpose.

"Mr. Greve has also stated that there is a possibility that he may be in the Washington, D. C., area and that he would be able to produce a qualified medical witness there and in that event it has been represented to Mr. Greve by myself that the case would be set to meet his convenience and the convenience of his witness, it being understood, of course, he would give us reasonable notice of a week or two. I understand that this is all satisfactory with you, Mr. Greve.

"Mr. Greve: Yes.

"Hearing Examiner: This represents what you wish to be done in your case?

"Mr. Greve: It is very satisfactory." (Tr. 70-71)

Obviously this shows only an abundance of care for petitioner's interests in addition to petitioner's complete satisfaction with the

assistance given him.[23]

"It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair." United States v. O'Rourke, 213 F.2d 759, 763 (C.A. 8, 1954). Petitioner has failed to make any showing of bias, much less a substantial showing.

Moreover, even if petitioner's allegations of bias on the part of the hearing examiner were accepted, they could not affect the Board's order. In an appeal to the Board from the hearing examiner, the Board considers the entire case de novo. It examines the record and reaches its own findings and conclusions.[24] Any prejudice resulting from prejudgment by the hearing examiner would thus be obviated. National Labor Relations Board v. Air Associates, Inc., 121 F.2d 586, 588-89 (C.A. 2, 1943).[25]

23/ Indeed, the Administrator said that he felt the examiner had gone too far in his solicitude for the petitioner. (Tr. 125, 128).

24/ In this case, the Board agreed with the examiner's findings and conclusions, and, after discussing the case, adopted the examiner's initial decision.

25/ "Even assuming, however, that it were proved, either by the record or otherwise, that the examiner was biased against respondent, we would find no reason, merely because of that fact, for upsetting the Board's order, since respondent does not assert that the examiner committed any error in the admission or exclusion of evidence, nor is there any indication that he conducted himself in a manner which either was likely to intimidate any of the witnesses or to prevent any of them from giving any relevant testimony as to what they believed to be the facts. An examination of the record shows no such unfairness as to constitute a denial of due process." 121 F.2d at 589.

Petitioner's allegation of bias on the part of the Board (Pet. Br. 12-13) thus is apparently only another expression of his opinion that the Board decided the case wrong. Patently, there is no basis for a charge of bias, as such, and, indeed, petitioner offers none.

CONCLUSION

The Board's order should be affirmed.

Respectfully submitted,

DONALD F. TURNER,
Assistant Attorney General,

O. D. OZMENT
Deputy General Counsel,

HOWARD E. SHAPIRO,
Attorney,
Department of Justice,

WARREN L. SHARFMAN
Associate General Counsel,
Litigation and Legislation

JOSEPH B. GOLDMAN
General Counsel,
Civil Aeronautics Board.

FREDERIC D. HOUGHTELING,
PAUL D. GERBER,
Attorneys,
Civil Aeronautics Board.

January 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Warren L. Sharfman
Associate General Counsel
Litigation and Legislation

APPENDIX A - Statutes and Regulations Involved

Relevant excerpts from the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301, et seq.):

* * * * *

TITLE III -- ORGANIZATION OF AGENCY AND POWERS AND DUTIES OF ADMINISTRATOR

* * * * *

Other Powers and Duties of Administrator

General

Sec. 313. [72 Stat. 752, 49 U.S.C. 1354] (a) The Administrator is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act.

* * * * *

TITLE VI -- SAFETY REGULATION OF CIVIL AERONAUTICS

General Safety Powers and Duties

Minimum Standards; Rules and Regulations

Sec. 601. [72 Stat. 775, 49 U.S.C. 1421] (a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

* * * * *

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

* * * * *

Airman Certificates

Power to Issue Certificate

Sec. 602. [72 Stat. 776, 49 U.S.C. 1422] (a) The Administrator is empowered to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft.

Issuance of Certificate

(b) Any person may file with the Administrator an application for an airman certificate. If the Administrator finds, after investigation, that such person possesses proper qualifications for, and is physically able to perform the duties pertaining to, the position for which the airman certificate is sought, he shall issue such certificate, containing such terms, conditions, and limitations as to duration thereof, periodic or special examinations, tests of physical fitness, and other matters as the Administrator may determine to be necessary to assure safety in air commerce. Except in the case of persons whose certificates are, at the time of denial, under order of suspension or whose certificates have been revoked within one year of the date of such denial, any person whose application for the issuance or renewal of an airman certificate is denied may file with the Board a petition for review of the Administrator's action. The Board shall thereupon assign such petition for hearing at a place convenient to the applicant's place of residence or employment. In the conduct of such hearing and in determining whether the airman meets the pertinent rules, regulations, or standards, the Board shall not be bound by findings of fact of the Administrator. At the conclusion of such hearing, the Board shall issue its decision as to whether the airman meets the pertinent rules, regulations, and standards and the Administrator shall be bound by such decision: Provided, That the Administrator may, in his discretion, prohibit or restrict the issuance of airman certificates to aliens, or may make such issuance dependent on the terms of reciprocal agreements entered into with foreign governments.

* * * * *

Amendment, Suspension, and Revocation of Certificates

Sec. 609. [72 Stat. 779, 49 U.S.C. 1429] The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propelle appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman

certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006, and the Administrator shall be made a party to such proceedings.

* * * * *

TITLE X -- PROCEDURE

* * * * *

Orders, Notices, and Service

Effective Date of Orders; Emergency Orders

Sec. 1005. [72 Stat. 794, as amended by 73 Stat. 427, 49 U.S.C. 1485] (a) Except as otherwise provided in this Act, all orders, rules, and regulations of the Board or the Administrator shall take effect within such reasonable time as the Board or Administrator may prescribe, and shall continue in force until their further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: Provided, That whenever the Administrator is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Administrator is authorized, either upon complaint or his own initiative without complaint, at once, if he so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of

safety in air commerce to meet such emergency: Provided further, That the Administrator shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this Act.

* * * * *

Judicial Review of Orders

Orders of Board and Administrator subject to Review

Sec. 1006 [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

Findings of Fact Conclusive

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

Relevant provision of the Federal Aviation Regulations, 14 C.F.R. 1.0 et seq. :

CHAPTER 1, SUBCHAPTER D - AIRMEN

Part 67 -- Medical Standards and Certification

Subpart A -- General

* * * * *

§ 67.15 Second-class medical certificate.

(a) To be eligible for a second-class medical certificate, an applicant must meet the requirements of paragraphs (b) through (f) of this section.

(b) Eye:

(1) Distant visual acuity of 20/20 or better in each eye separately, without correction; or of at least 20/100 in each eye separately corrected to 20/20 or better with corrective glasses, in which case the applicant may be qualified only on the condition that he wears those glasses while exercising the privileges of his airman certificate.

(2) Enough accommodation to pass a test prescribed by the Administrator based primarily on ability to read official aeronautical maps.

(3) Normal fields of vision.

(4) No pathology of the eye.

(5) Ability to distinguish aviation signal red, aviation signal green, and white.

(6) Bifoveal fixation and vergencephoria relationship sufficient to prevent a break in fusion under conditions that may reasonably occur in performing airman duties.

Tests for the factors named in subparagraph (6) of this paragraph are not required except for applicants found to have more than one prism diopter of hyperphoria, six prism diopters of esophoria, or six prism diopters of exophoria. If these values are exceeded, the Federal Air Surgeon may require the applicant to be examined by a qualified eye specialist to determin if there is bifoveal fixation and adequate vergencephoria relationship. However, if the applicant is otherwise qualified, he is entitled to a medical certificate pending the results of the examination.

(c) Ear, nose, throat and equilibrium:

(1) Ability to hear the whispered voice at 8 feet with each ear separately.

(2) No acute or chronic disease of the middle or internal ear.

(3) No disease of the mastoid.

(4) No unhealed (unclosed) perforation of the eardrum.

(5) No disease or malfunction of the nose or throat that might interfere with or be aggravated by, flying.

(6) No disturbance in equilibrium.

(d) Nervous system:

(1) No established medical history or clinical diagnosis of any of the following:

(i) A character behavior disorder that is severe enough to have repeatedly manifested itself by overt acts.

(ii) A psychotic disorder.

(iii) Chronic alcoholism.

(iv) Drug addiction.

(v) Epilepsy.

(vi) A disturbance of consciousness without satisfactory medical explanation of the cause.

(2) No other disease of the nervous system, mental abnormality, or psychoneurotic disorder that the Civil Air Surgeon finds --

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(ii) May reasonably be expected within 2 years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

(e) Cardiovascular:

(1) No established medical history or clinical diagnosis of--

(i) Myocardial infarction; or

(ii) Angina pectoris or other evidence of coronary heart disease that the Federal Air Surgeon finds may reasonably be expected to lead to myocardial infarction.

(f) General medical condition:

(1) No established medical history or clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control.

(2) No other organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon finds --

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(ii) May reasonably be expected, within two years after the finding to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

* * * * *

[Section f is identical in terms with the comparable sections governing first and second class medical certificates, section 67.13 (f) and 67.17 (f), respectively.]

Relevant provision of the Civil Aeronautics Board Procedural Regulations, 14 C.F.R. 301.1, et seq.

CIVIL AERONAUTICS BOARD PROCEDURAL REGULATIONS

Part 301 -- RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

* * * * *

§ 301.22 Burden of proof

In proceeding under section 609 of the Act the burden of proof shall be on the Administrator.

* * * * *

Procedure on Emergency Orders

§ 301.50 Proceedings where the Administrator has made an emergency order.

* * * * *

(c) The examiner shall, immediately upon the filing of the answer, set the date and place for hearing upon not to exceed 8 days' notice to the parties. The initial decision (not made under authority delegated by § 301.29(b)) shall be made orally on the record at the termination of the hearing and after opportunity for oral argument.

* * * * *

APPENDIX B

Excerpt from the Board brief in John Doe v. Civil Aeronautics Board, 356 F.2d 699 (C.A. 10, 1966), relating to the jurisdiction of the court to consider the validity of the Administrator's regulation in a statutory appeal from an order of the Board:

B. Jurisdiction of the Court to consider the validity of the Administrator's regulation

1. The proper role of the Board in reviewing the Administrator's application of his regulations, and the manner in which judicial review is to be obtained of such regulations, are matters of major importance in the congressional scheme for enforcement of air safety under the Federal Aviation Act. In these circumstances, we are constrained to show that the Board may not provide review of the validity of the Administrator's regulations, but only of the propriety of the application of the regulations to the specific case. As a consequence, there is serious doubt whether the Administrator's regulations may be reviewed by the courts as an incident to their review of a Board order applying those regulations.

One of the principal purposes of the Federal Aviation Act of 1958 was to centralize authority over air safety in the Administrator of the new Federal Aviation Agency. He was to be responsible for both the promulgation and the administration of safety standards and regulations. As the Senate Report emphasized (S. Rep. No. 1811, 85th Cong., 2d Sess., p. 10):

> "The proposed legislation abolishes the present unnatural division of responsibility between the Civil Aeronautics Administration and the Civil Aeronautics Board for the promotion of civil aeronautics generally, and gives full

> authority in this field to a new Federal Aviation Agency. The Agency, headed by a civilian administrator, would replace the present Civil Aeronautics Administration, assuming all of its existing functions as well as all safety regulatory functions of the Civil Aeronautics Board. It would be independent of any other Government agency and responsible only to the Congress, the President and the public."

The congressional intent that the Board was not to have supervisory or reviewing authority over the Administrator's safety regulations was made clear in the course of legislative consideration of the 1958 Act. As originally drafted, the bill would have empowered the Board, either upon its own initiative or upon request of persons affected, to suspend for review of any of the Administrator's rules, regulations, and standards when it finds reasonable grounds to believe that they will "impose substantial economic hardship on persons affected thereby without sufficient cause"; and if the Board finds such effect, it would have authority "to order such modification as it may deem necessary to eliminate such substantial economic hardship."[26/] As a result of emphatic opposition by both the industry and the Executive Branch of the Government, this provision was eliminated. The Senate Report stated (S. Rep. No. 1811, supra, at p. 11):

> "As originally proposed, S. 3880 would have permitted the appeal of safety-rule-making action by the Administrator

---

26/ Sec. 18(3), S. 3880, 85th Cong., 2d Sess., pp. 26, 27, May 21, 1958, which would have amended Section 601(c) of the Civil Aeronautics Act of 1938. An identical provision was contained in the House version. Sec. 18(3), H.R. 12616, 85th Cong., 2d Sess., pp. 26, 27, May 21, 1958.

> to the Board whenever economic hardship might be involved. Your committee has deleted this provision, however, since in practical effect it would have allowed virtually all such rules to be appealed, thus frustrating and inhibiting the efficient discharge of this vital function by the Administrator, and continuing the present dichotomy in rulemaking."

2. The significant fact is that the successful opponents of this provision urged that the Administrator's rules should be reviewed only by the courts, and stressed that this was the objective of deleting the above draft section. General Quesada, then Special Advisor to the President and later the first Administrator under the 1958 Act, appearing in behalf of the Administration, stated: 27/

> "S. 3880 provides for appeal of the regulations to the Civil Aeronautics Board. This appears to be an unnecessary appellate step and threatens to continue the present confusion of responsibility between the two agencies. * * * The regulations should be issued in the name of the head of the Agency and appeals therefrom should be directly to the courts as is prevalent practice in other similar Agencies."

James T. Pyle, the then Administrator of Civil Aeronautics, pointed out that "the present difficulty in the administration of the rules and regulations relating to aviation that must be cured is the diffusion of authority in several agencies," and argued that the appeal provision "defeats the basic objective of this legislation which is to establish a single Agency with adequate authority to assure the safe and efficient operation of air traffic"(Senate Hearings, p. 233). He agreed that there should be protection against

---

27/ Hearings before a Subcommittee on Aviation of the Senate Committee on Interstate Commerce, 85th Cong., 2d Sess., on S. 3880 (hereinafter referred to as "Senate Hearings"), pp. 153-154.

arbitrary action but emphasized that an appeal to the Board was unnecessary in this regard in view of the availability of court review (Id. pp. 233-234). And the industry position was presented by Stuart G. Tipton, the president of the Air Transport Association, who urged that the bill be amended to vest the safety rule-making power "in a new Agency without appeal", and added, "[l]et the new Agency, after following the usual legal procedures for issuing regulations, adopt them, take the responsibility for them, and provide those interested, the ones affected, with their legal remedies in the courts rather than to have an additional administrative step to the Civil Aeronautics Board."[28/]

Further, the President's Message to the Congress requesting new legislation recommended that the function of issuing air safety regulations then vested in the Board "be lodged in" the FAA, and specified that "[d]ecisions of the Administrator with respect to such regulations should be final, subject, of course, to such appeals

---

28/ Senate Hearings, p. 33. In the course of Mr. Tipton's testimony, Senator Monroney, the author of the bill, and Senator Smathers both pointed out that review of the merits of a regulation or standard would be unavailable if the only recourse were to the courts which must confine themselves to such narrow questions as arbitrariness and lack of power. The provision permitting an appeal to the Board, they said, would make possible review on the merits (Senate Hearings, pp. 33, 35-36). Mr. Tipton answered that the right to appeal would "delay decision, and * * * divide responsibility, and the conclusion we reached was that our tremendous need at this time for decision and for consolidated responsibility * * * for these regulations, outweighed the benefits that we might get from appeals." He therefore opposed appeals "other than to the courts" (Id., p. 34).

to the courts as may be appropriate."[29/] That this approach prevailed is demonstrated by the Senate Committee Report, which, in stating that it had deleted the provision for appeal of regulations to the Board, quoted from the testimony of Louis S. Rothschild, the then Undersecretary of Commerce for Transportation: "Our courts are our constant safeguard against the exercise of power arbitrarily--Congress is our safeguard against the exercise of authority unwisely."[30/]

The question of review also was adverted to in the congressional debates. Thus, the following colloquy between Senator Monroney (the Senate sponsor of the bill) and Senator Thye confirms the congressional understanding and intent (104 Cong. Rec. 13646 (1958)):

> "Mr. Thye. Will the Board have an opportunity to review a rule which is being contemplated by the Administrator before it is put into effect?"
>
> "Mr. Monroney. The Board will not have such an opportunity. The review, as such, will be in the courts."

In the same vein, Congressman Harris (the House sponsor) stated that safety rulemaking had been transferred to the Administrator "without any review by the Civil Aeronautics Board but subject to the Administrative Procedures [sic] Act" (104 Cong. Rec. 16080 (1958)).

In sum, the Administrator's issuance of regulations cannot be directly challenged by appeal to the Board, only by a proceeding in the federal district courts. An example of such a proceeding was the

---

29/ Message of President Eisenhower to the Congress, June 13, 1958, set forth in S. Rep. No. 1811, 85th Cong., 2d Sess., p. 27.

30/ Id., p. 12. See also H. Rep. No. 2360, 85th Cong., 2d Sess., pp. 11, 16.

case challenging the Administrator's establishment of an age limitation for airline pilots, Air Line Pilots Ass'n v. Quesada, 276 F.2d 892 (C.A. 2, 1960), cert. denied, 366 U.S. 962 (1961).[31]

3. While the 1958 Act precludes Board review of the Administrator's regulations, it provides that the Board would continue to exercise "quasi-judicial powers" over specific agency orders, i.e., "with respect to Agency action involving individual airman, aircraft, and related safety certificates" (S. Rep. 1811, 85th Cong., 2d Sess., pp. 10-11; H. Rep. 2360, 85th Cong., 2d Sess., p. 16). Orders of the Administrator denying applications for airman certificates may be appealed to the Board under Section 602 of the Act, as occurred in this case; and disciplinary orders--modifying, suspending or revoking all types of certificates (airman, air worthiness, air carriers operating, etc.)--may be appealed to the Board under Section 609.

Even in these proceedings, it appears to be clear that the Board reviews only the application of the Administrator's rules, and has no authority to pass upon their propriety. This is explicitly provided by statute in the situation here involved; review of orders denying application for airman certificates. For Section 602 states that the Board decision shall be "whether the

---

31/ In advance of the issuance of an order, the Administrator's regulation cannot be reviewed in this Court under Section 1006, 49 U.S.C. 1486, but is challenged in a district court proceeding. Division of Production v. Halaby, 307 F.2d 363 (C.A. 5, 1962); Arrow Airways, Inc. v. Civil Aeronautics Board, 182 F.2d 705 (C.A.D.C. 1950), cert. denied, 340 U.S. 828 (1950).

airman meets the pertinent rules, regulations and standards" of the Administrator, and the Board has properly construed the Act as denying it authority to provide review of the validity of the Administrator's regulations. Docket SM-4-4, William B. Coberly, Jr., 31 C.A.B. 1089 (1960); Docket SM-4-18, Robert N. Gosch, 31 C.A.B. 1098 (1960). While there is no such explicit limitation in Section 609, dealing with disciplinary actions, the legislative history and other considerations which militate against Board review of the Administrator's rules in Section 602 proceedings are equally applicable to ones arising under Section 609. 32/

4. The limited scope of the Board's review of an Administrator's order presents a problem when the airman (or other party) subject to such order seeks to challenge both (a) the validity of the underlying rule of the Administrator and (b) the factual basis for the order that he did not satisfy the requirements of the rule. Under Section 602,

---

32/ An additional indication that the Board was not intended to provide review of the Administrator's regulations is found in Section 1001 of the Act (49 U.S.C. 1481), which provides that:

> "The Board, in its discretion, may enter its appearance and participate as an interested party in any proceeding conducted by the Administrator under title III of this Act, and in any proceeding conducted by the Administrator under title VI of this Act from which no appeal is provided to the Board."

It would be incongruous indeed if the Congress had conferred the right upon the Board to participate in rule-making proceedings before the Administrator (which it has), and at the same time intended it to have the authority to set aside those regulations which it could not persuade the Administrator to alter.

resort by administrative appeal to the Board is appropriate only when the airman controverts the factual determination that he does not satisfy the applicable rules; exhaustion of this administrative appeal would, indeed, be a necessary prelude to judicial review on this point. Conversely, if the airman desires to challenge only the validity of the Administrator's rule, it seems clear that he could seek judicial review of the Administrator's denial directly in the courts. Congress evidently did not consider the present situation, in which petitioner raises both issues.

As a general rule, cases dealing with regulatory acts establish that a party attacking administrative orders can, in the same proceeding, challenge the validity of an underlying rule. E.g., Functional Music, Inc. v. Federal Communications Commission, 274 F.2d 543 (C.A.D.C. 1958), cert. denied, 361 U.S. 813 (1959); Dyer v. Securities and Exchange Commission, 266 F.2d 33 (C.A. 8, 1959), cert. denied, 361 U.S. 835 (1959). An example on review of an order of the Civil Aeronautics Board applying its own regulation, is Great Lakes Airlines, Inc. v. Civil Aeronautics Board, 291 F.2d 354, 367 (C.A. 9, 1961), cert. denied, 368 U.S. 890 (1961). These cases, however, involve the ordinary situation in which the regulations were those of the agency applying them, and in which the agency had authority both to reexamine them and, in the course thereof, to receive any evidence which might be pertinent to the claim of invalidity advanced.

The difficulty in applying this doctrine here arises, as indicated, from the limited scope of the Board's authority. This is a

proceeding against the Board as respondent under Section 1006 and it is, of course, prepared to defend its decision that the petitioner had not qualified under the regulations. However, the Board is hardly an appropriate party to defend the validity of a regulation of the Administrator, an issue which it has not considered and which was not open before it. Review of the Board's order is limited in the normal course to matters which are or may be determined by it. Section 1006 itself appears to contemplate judicial review only of the determination which the lower tribunal was empowered to make (in this case the Board's determination of whether the airman meets the Administrator's standards), as witnessed by the provisions of Section 1006(e) which embody the substantial evidence rule, and preclude consideration by the reviewing court of matters not urged to the agency unless there were reasonable grounds for such failure. And the provision authorizing intervention of the Administrator (Section 1008) does not appear to expand these jurisdictional limits. Moreover, to the extent that the party challenging the validity of a rule desires to make an evidentiary case, the Board does not appear to be a proper forum to take the evidence, since it cannot rule upon the issue.

On the other hand, the conclusion which would appear to follow, that the issue of validity of the Administrator's rule may not be raised in a proceeding for review of a Board order applying it, would result in a situation in which the airman would be required to resort to separate proceedings to obtain full review. One would be the administrative appeal to the Board followed by judicial review, as here, to determine

whether the petitioner satisfied the Administrator's regulations. The other would be a direct challenge to the Administrator's regulation in a separate judicial proceeding. This alternative doubtless would be unsatisfactory from the point of view of the airman and also would result in court litigation beyond that which would eventuate if the issue of validity of the rule were open in proceedings for review of the Board orders applying it. However, there is serious doubt that the statutory scheme adopted by Congress permits both issues to be raised in a proceeding for review of the Board's order under Section 1006.

If the Court should reach the question as to its jurisdiction to consider the validity of the Administrator's rule in this proceeding, it is the position of the Board and the Administrator that the Court lacks jurisdiction. They believe that requiring a separate proceeding to challenge the validity of the Administrator's underlying regulation represents the most practical solution consonant with the legislative history and the over-all statutory pattern. The Department of Justice takes no position on the merits of the jurisdictional issue at this time. As already indicated, however, the issue posed by the petitioner is believed to so obviously lack substance that the Court may dispose of it summarily without deciding the jurisdictional point, as did the Court of Appeals for the Fourth Circuit in the Carrington case.